

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to Repeal Rule 63.2(b) of
Commission Rules of Practice and Procedure.

FILED
PUBLIC UTILITIES COMMISSION
JANUARY 9, 2002
SAN FRANCISCO, CALIFORNIA
RULEMAKING 02-01-010

ORDER INSTITUTING RULEMAKING**1. Summary**

In this order, we institute a rulemaking to repeal Rule 63.2(b),¹ which provides for the automatic reassignment of the administrative law judge (ALJ) in ratesetting proceedings. The proposed repeal will eliminate this source of potential delay in Commission decisions on ratesetting matters. The Commission would retain Rules 63.3 and 63.4 regarding unlimited peremptory challenges of the ALJ and reassignment of the ALJ for cause, respectively. The rulemaking includes minor revisions to Rules 63.2(c) and 63.2(d) to delete reference to Rule 63.2(b).

2. Background**A. Rule 63.2(b)**

In Decision (D.) 97-12-043, we adopted final rules implementing Senate Bill (SB) 960 (Leonard, Stats. 1996, ch. 96-0856). These rules included Rule 63.2(b), which provides for the automatic reassignment of the ALJ in ratesetting proceedings.²

¹ All Rule references are to the Commission Rules of Practice and Procedure unless otherwise specified.

² Rule 63.2(b) states:

Petitions for automatic reassignment of the ALJ pursuant to Rule 63.2(b) differ substantially from our procedures for unlimited peremptory challenges of the ALJ and challenges of the ALJ for cause. As to the former, Rule 63.3 permits parties in adjudicatory or ratesetting proceedings to file an unlimited number of petitions for reassignment of the ALJ if the assigned ALJ has (1) served within the previous 12 months in any capacity in an advocacy position at the Commission or has been employed by a regulated public utility, (2) has served in a representative capacity in the proceeding, or (3) has been a party to the proceeding. As to the latter, Rule 63.4 permits a party to petition for reassignment of the ALJ in any proceeding if the assigned ALJ has a financial interest in the subject matter of the proceeding or in a party to the proceeding, or has bias, prejudice, or interest in the proceeding.

(b) A party to a proceeding preliminarily determined to be ratesetting under Rule 6(a)(1), 6(c)(2), or 6(d), or determined to be ratesetting under Rule 6(b)(1) or 6(c)(1), or a person or entity declaring the intention in good faith to become a party to such proceeding, shall be entitled to petition, only once, for automatic reassignment of that proceeding to another Administrative Law Judge in accordance with the provisions of this subsection; however, no more than two reassignments pursuant to this subsection shall be permitted in the same proceeding. The petition shall be filed and served as provided in subsection (a) of this rule, and shall be supported by a declaration similar in form and substance to that set forth in subsection (a) of this rule.

Whenever a timely petition for automatic reassignment of a ratesetting proceeding is filed, the Chief Administrative Law Judge, promptly at the end of the 10-day period specified in subsection (c) of this rule, shall issue a ruling reassigning the proceeding. A party to the proceeding, or a person or entity declaring the intention in good faith to become a party to the proceeding, may petition for another automatic reassignment no later than 10 days following the date of such ruling. The petition shall be filed and served as provided in subsection (a) of this rule, and shall be supported by a declaration similar in form and substance to that set forth in subsection (a). The second automatic reassignment of the proceeding shall not be subject to further petitions pursuant to this subsection.

In contrast, under Rule 63.2(b), parties or persons who in good faith intend to become parties in ratesetting proceedings may petition for the automatic reassignment of the ALJ, based on a petition and a declaration³ stating under penalty of perjury that the party cannot have a fair or expeditious hearing before the assigned ALJ. This petition must be filed within 10 days after the notice of assignment of the ALJ. The Chief ALJ must issue a ruling granting the petition and reassigning the proceeding to another ALJ, unless the petition is not timely or exceeds the number of permitted petitions for the proceeding. If the petition is denied, the Chief ALJ, in consultation with the Commission President, must issue a ruling that explains the basis for denial.

Another party may file a second petition for automatic reassignment, no later than 10 days after the Chief ALJ's ruling on the first petition. The Chief ALJ must grant or deny the second application according to the same procedures and standards. Only two petitions for automatic reassignment are permitted in the same ratesetting proceeding.

B. History

In adopting the challenge rules, we recognized that although Public Utilities Section 1701.24 (enacted by SB 960) requires provisions for the automatic reassignment of the ALJ in adjudicatory proceedings, Section 1701.3 (also enacted by SB 960) does not contain this requirement for ratesetting proceedings. However, we found that permitting petitions for automatic reassignment of the ALJ in ratesetting proceedings would give parties both the perception and the reality of a fair process.

³ Rule 63.2 requires an affidavit, rather than a declaration, from an out-of-state person to support a petition for automatic reassignment of the assigned ALJ.

⁴ All subsequent code references are to the Public Utilities Code, unless otherwise specified.

In D.98-05-063, we denied the application of The Utility Reform Network (TURN) for a rehearing of D.97-12-043. TURN sought a rehearing solely on the grounds that the Commission did not have authority to adopt Rule 63.2(b), because Section 1701.3 does not require provisions for the automatic reassignment of the ALJ in ratesetting proceedings. We reasoned that the absence of a legislative requirement for such provisions does not indicate or imply that the Legislature intended to bar the Commission from permitting automatic challenges of the ALJ in ratesetting proceedings.

3. Discussion

Since our adoption of Rule 63.2(b) in 1997, the Commission's caseload has become more complex, in significant part because of California's energy crisis. The Commission must process cases quickly and efficiently to respond to California's energy crisis and to meet statutory deadlines for the completion of proceedings imposed by SB 960, while maintaining its programs for all of the industries and activities regulated under the Public Utilities Code. At the same time, the Commission has a limited number of ALJs available, and this number is further constrained because of the hiring freeze imposed by Executive Order D-48-01.⁵ As a result, we must streamline our procedures to avoid unnecessary delays in processing cases and to utilize our limited ALJ staff wisely. We note that permitting two petitions for automatic reassignment of the ALJ in ratesetting matters may delay our work on a proceeding for over 20 days while issues related to the reassignment of the ALJ are resolved. Issues, such as scheduling and scoping, that we normally begin to address in that initial period following

⁵ Executive Order D-48-01, signed by the Governor on October 23, 2001, prevents the Commission, like other state agencies, from hiring new staff until June 30, 2003. We therefore cannot replace ALJs who retire or leave employment with the Commission, nor can we fill positions currently vacant.

assignment of an ALJ, may well be delayed beyond that period. Finally, the processing of other cases (besides the case where automatic reassignment is requested) could be affected adversely, as replacement ALJs likely must be drawn from among ALJs already carrying large caseloads.

We therefore propose to repeal Rule 63.2(b), thereby ending automatic reassignment of the assigned ALJ in ratesetting proceedings, and to make minor related amendments to Rules 63.2(c) and (d). Since parties may still make peremptory challenges of the assigned ALJ on the grounds specified in Rule 63.3, and may challenge the assigned ALJ for cause pursuant to Rule 63.4, the repeal of Rule 63.2(b) will not deny a fair hearing to parties in ratesetting proceedings.

A copy of the proposed rule changes in strike-out form is attached as Appendix A.

4. Preliminary Scoping Memo

Pursuant to Rule 6(c)(2), we preliminarily determine that the category of this proceeding is quasi-legislative and preliminarily find that evidentiary hearings will not be needed. Within 10 days of the effective date of this order, parties shall file and serve any comments or objections to the categorization of this proceeding as quasi-legislative. These comments or objections should also be served on the attached service list for this Rulemaking. (See Appendix B.)

The preliminary schedule for this proceeding is as follows:

<u>Required Action</u>	<u>Date</u>
Commission adoption of OIR	January 9, 2002
Publication of Notice and proposed Rule change in California Regulatory Notice Register	January 25, 2002
Last day for interested persons to request a public hearing	March 6, 2002

Last day for filing comments	March 11, 2002
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<u>Required Action</u>	<u>Date</u>
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Last day for filing reply comments	March 21, 2001
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Commission approval of decision adopting proposed Rule change	Spring 2002
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5. Notice to Public/Publication of Proposed Rules Revision

In order to ensure that the public has notice of this proceeding and the opportunity to comment on our proposal, we direct the Executive Director to serve a copy of this decision on the attached service list, which generally includes persons interested in Commission procedural rulemakings. A copy of this decision will also be published on our website.

We also direct the Chief Administrative Law Judge to submit to the Office of Administrative Law all required forms preparatory to that Office's publishing these proposed rule changes in the California Regulatory Notice Register. For the purposes of this publication, the Chief ALJ may propose nonsubstantive changes to the draft and to the existing Title 20 Rules, wherever such nonsubstantive changes will improve the clarity, organization, or consistency of the Commission Rules of Practice and Procedure.

6. Public Review and Comment/Request for Hearing

Interested parties may submit written comments to the Commission on the proposed repeal of Rule 63.2(b). Such comments shall be filed and served no later than 5:00 p.m. on March 11, 2002 (45 days after publication of the notice in the California Regulatory Notice Register). Replies to comments made by other parties shall be filed by no later than 5:00 p.m. on March 21, 2002 (55 days after publication of the notice in the California Regulatory Notice of Register). Comments and reply comments shall also be concurrently mailed to ALJ Myra J.

Prestidge at 505 Van Ness Avenue, San Francisco, CA 94102 or e-mailed to ALJ Prestidge at tom@cpuc.ca.gov.

Although the Commission does not plan to hold a hearing on this matter, interested parties may request a public hearing in writing by no later than 5:00 p.m. on March 6, 2002 (15 days before the close of the written comment period). Written requests for a hearing shall be filed, served, and mailed to ALJ Prestidge as indicated above. If a hearing is scheduled, we will notify the public as required by law.

Findings of Fact

1. For reasons set forth in the Discussion section of the foregoing decision, a rulemaking is appropriate to consider repeal of Rule 63.2(b) to eliminate petitions for the automatic challenge of the assigned ALJ in ratesetting proceedings.
2. This rulemaking is quasi-legislative and will not need an evidentiary hearing.

Conclusions of Law

1. The Commission is not required by state law to permit petitions for automatic reassignment of the ALJ in ratesetting proceedings.
2. Today's order should be effective immediately so as to enable prompt consideration of the proposed rule changes.

O R D E R

IT IS ORDERED that:

1. A rulemaking proceeding is hereby instituted on the Commission's own motion to consider the repeal of Rule 63.2(b), and to make minor related amendments to Rule 63.2(c) and (d).

2. The Executive Director shall serve a copy of this order on the service list in Appendix B.

3. The Chief Administrative Law Judge shall promptly submit a notice of the proposed amendments, along with any other necessary documents, to the Office of Administrative Law for publication in the California Regulatory Notice Register.

4. All interested parties may submit written comments on the proposed amendments by no later than March 11, 2002, and reply comments by no later than March 21, 2002. Comments shall be filed with the Commission Docket Office in accordance with the Rules of Practice and Procedure and shall be served on the service list in Appendix B. Comments shall also be mailed to ALJ Prestidge at 505 Van Ness Avenue, San Francisco, CA 94102 or e-mailed to ALJ Prestidge at tom@cpuc.ca.gov.

5. All interested parties may request a public hearing on the proposed repeal of Rule 63.2(b) and the related amendments to Rule 63.2(c) and (d) in writing by no later than March 6, 2002. These requests shall be filed with the Commission Docket Office in accordance with the Rules of Practice and Procedure and shall be served on the service list for R.99-11-021. Requests for a public hearing shall also be mailed to ALJ Prestidge at 505 Van Ness Avenue, San Francisco, CA 94102 or e-mailed to ALJ Prestidge at tom@cpuc.ca.gov.

This order is effective today.

Dated January 9, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD

GEOFFREY F. BROWN
Commissioners

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TITLE 20. PUBLIC UTILITIES AND ENERGY

Division 1. Public Utilities Commission

Section 63.2. (Rule 63.2) Petitions for Automatic Reassignment.

(a) A party to a proceeding preliminarily determined to be adjudicatory under Rule 6(a)(1) or 6(d), or determined to be adjudicatory under Rule 6(b)(1) or 6(c)(1), shall be entitled to petition, once only, for automatic reassignment of that proceeding to another Administrative Law Judge in accordance with the provisions of this subsection. The petition shall be filed and served in the proceeding where reassignment is sought, and on the Chief Administrative Law Judge and the President of the Commission. The petition shall be supported by declaration under penalty of perjury (or affidavit by an out-of-state person) in substantially the following form:

_____, [declares under penalty of perjury:] That [s]he is [a party] [attorney for a party] to the above-captioned adjudicatory proceeding. That [declarant] believes that [s]he cannot have a [fair] [expeditious] hearing before Administrative Law Judge [to whom the proceeding is assigned]. That declarant [or the party declarant represents] has not filed, pursuant to Rule 63.2, any prior petition for automatic reassignment in the proceeding.

Dated _____, at _____, California.

[Signature]

Except as provided in Rules 63.3 and 63.4, no party in an adjudicatory proceeding will be permitted to make more than one petition for reassignment in the proceeding. In an adjudicatory proceeding where there is more than one complainant or similar party, or more than one defendant or similar party, only one petition for automatic reassignment for each side may be made.

Where the party seeking automatic reassignment is one of several parties aligned on the same side in the proceeding, the declaration shall include a showing that either (1) no previous petition for automatic reassignment has been filed in the proceeding, or (2) the interests of the

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petitioner are substantially adverse to those of any prior petitioner for automatic reassignment in the proceeding.

(b) Any petition and supporting declaration filed pursuant to subsection (a) of this rule shall be filed no later than 10 days after the date of the notice of the assignment or reassignment.

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(c) Upon the filing of a petition for automatic reassignment, the Chief Administrative Law Judge, subject only to the restrictions in this rule on the number and timeliness of petitions in a given proceeding, shall issue a ruling reassigning the proceeding to another Administrative Law Judge. The Chief Administrative Law Judge, in consultation with the President of the Commission, shall issue a ruling explaining the basis for denial whenever a petition for automatic reassignment is denied.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Section 1701.2, Public Utilities Code.

(END OF APPENDIX A)